BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development.	Rulemaking 01-10-024 (Filed October 25, 2001)

JOINT RULING OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE REGARDING PROCEDURE FOR ADOPTION OF STANDARD CONTRACT TERMS AND CONDITIONS

Background

In Decision (D.) 03-06-071, the Commission provided an opportunity for the parties to negotiate further to develop standard contract terms and conditions to be adopted by the Commission for renewable energy resources under the renewable procurement standard (RPS). The parties were given time to negotiate on their own, and the Commission's Energy Division conducted two workshops to facilitate negotiation and agreement. Nevertheless, the parties could not reach agreement.

Accordingly, the assigned Administrative Law Judge (ALJ) issued a ruling[1] establishing a procedure for the adoption of standard terms and conditions. That procedure was described:

> The process for adopting standard contract terms and conditions will be as follows. First, parties will submit opening and reply briefs

[1] Administrative Law Judge's Ruling Establishing Procedure for Adoption of Standard Contract Terms and Conditions dated October 22, 2003.

> on what general terms and conditions should be standard. Based on these briefs, the Commission will issue an interim decision identifying which terms and conditions shall be adopted as standard. Subsequently, at the direction of the assigned ALJ, the parties will submit briefs with specific recommended language for each of those terms and conditions. The parties may then be given another opportunity to resolve their differences. Finally, the Commission will issue a decision adopting specific language for each standard term and condition. (*Id.*, p. 2.)

In order to expedite this proceeding, we are modifying this procedure to have the first step, identifying which terms and conditions shall be adopted as standard, performed by this joint ruling, rather than by a Commission decision. The second step described above, the adoption of specific language for each standard term and condition, will be done via Commission decision. Accordingly, this joint ruling identifies which terms and conditions shall be adopted as standard, but without adopting specific language. In short, the final product will remain the same, but the process will be streamlined.

Our immediate goal is to develop a "year one" contract to enable the RPS solicitation to move forward. We expect that the parties and the Commission will use the experience gained to further refine the contract language as needed.

Threshold Issues

In his Ruling, the ALJ determined that:

> Consistent with SB 1078, "standard" means that the terms and conditions approved by the Commission are to be the same in all contracts under the RPS program, and may not be modified by negotiation. To the extent that parties wish to be able to negotiate certain terms and conditions, they may argue that those terms and conditions should not be standardized, or that the adopted standard terms and conditions should allow for negotiation (e.g., "delivery point shall be _____."). (*Id.*)

In the joint brief filed by the Center for Energy Efficiency and Renewable Technologies (CEERT), the Independent Energy Producers (IEP), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and The Utility Reform Network (TURN) (collectively referred to here as the CEERT Parties), the CEERT Parties request reconsideration of this aspect of the ALJ's Ruling. (CEERT Parties Opening Brief, pp. 2-3, 8-12.) The CEERT Parties believe that the contracting parties should be able to negotiate and agree upon modification of standard terms. The CEERT Parties argue that immutable standard terms may frustrate commercial transactions by making it more difficult and costly for a supplier to bid its services, or by preventing a utility from accommodating the seller's needs. (*Id.*, p. 8.) According to the CEERT Parties, there is nothing in the relevant statute (Pub. Util. Code § 399.14(a)(2)(D) or Commission decision (D.03-06-071) that prohibits the negotiation of standard terms. (*Id.*, p. 9.)

Southern California Edison (SCE) agrees with the CEERT Parties that parties should be able to modify Commission-approved standard terms, subject to later Commission approval of the modifications. (SCE Reply Brief, p. 3.) According to SCE, no party can anticipate all of the potential products or project structures that could be proposed under the RPS program, and all parties will want the flexibility to negotiate agreements that meet their needs. (*Id.*)

Ridgewood Olinda, LLC (Ridgewood) disagrees. Ridgewood argues that allowing standardized terms and conditions to be modified through negotiations would undermine the very purpose of standardization. (Ridgewood Opening Brief, pp. 2, 8.) According to Ridgewood, it would be a waste of time and energy to allow the parties to renegotiate the same terms and conditions that they are litigating now. Finally, Ridgewood argues that a party with sufficient market power could use its ability to negotiate to impose onerous terms on its counter

party. (*Id.*, p. 8.) The Green Power Institute (Green Power) also argues that at least one standard term and condition (the definition of a Renewable Energy Credit, or REC) should not be negotiable. (Green Power Opening Brief, p. 2.)

Other parties, such as Solargenix, the California Wind Energy Association (CalWEA), the California Biomass Energy Alliance, and Vulcan Power Company,[2] while expressing concerns regarding disparities in bargaining power, conditionally endorse negotiability of standard terms and conditions. The CalWEA Parties, for example, propose a "ten-point role" for standard contract terms and conditions, in an effort to limit or control the negotiation process. (CalWEA Parties Opening Brief, pp. 5-8.) The CEERT Parties similarly propose an approach to control negotiation, in lieu of a ban on negotiation. (CEERT Parties Opening Brief, pp. 10-11.)

These various arguments all have some merit. Given the potential variety of future contracts and parties, a rigidly standardized contract that cannot be modified will undoubtedly create problems for someone at some point. On the other hand, if everything is negotiable, the fundamental idea of standard terms and conditions could be rendered meaningless. Particular language could be called "standard," but if it is regularly negotiated out of contracts, it is no longer truly standard.

The statute provides minimal guidance, as it merely requires the Commission to adopt:

> Standard terms and conditions to be used by all electrical corporations in contracting for eligible renewable energy resources,

[2] CalWEA, the California Biomass Energy Alliance, and Vulcan Power Company filed jointly, and will be referred to here collectively as the CalWEA Parties.

including performance requirements for renewable generators. (§ 399.14(a)(2)(D).)

As the CEERT Parties point out, the statute does not define "standard."[3] (CEERT Parties Opening Brief, pp. 8-9.) Accordingly, in order to implement the statute, we must determine what is meant by "standard." In looking at the numerous possible terms and conditions that have been considered for possible standardization, it becomes clear that not all terms and conditions are equivalent.

Green Power, for example, divides the various terms and conditions into three categories: 1) those governing compliance rules; 2) those with implications for fair competition among different renewables; and 3) those pertaining to the business relationship between the buyer and seller. (Green Power Opening Brief, p. 1.) Green Power notes that the need for standardization of a particular term or condition varies, depending upon which category it falls under.

The CEERT Parties oppose Green Power's categorization approach, and assert that "no reason" exists to prevent parties from negotiating certain standard terms. (CEERT Parties Reply Brief, p. 4.) CEERT Parties neglect to explain, however, the benefit of allowing parties to negotiate terms such as the definition of Commission approval, or the choice of governing law. Another example not addressed by the CEERT Parties is the level of confidentiality; while the Commission would not object to negotiations that resulted in increased public disclosure of information, there is no good reason to allow the parties to

[3] The CEERT Parties attempt to argue that the dictionary definition of the word "standard" supports their position that standard terms and conditions be negotiable. In fact, the dictionary definition they provide could be used to support the opposite proposition as well—that "standard" means established by authority, and not negotiable by the parties.

negotiate to keep more information secret than the Commission-approved standard.

While we do not expressly adopt Green Power's categories, we agree with the fundamental point that not all standard terms and conditions are the same. Accordingly, for some of the standard terms and conditions we adopt, no negotiation will be allowed, while for others, limited negotiation will be allowed, and for others, relatively unconstrained negotiation will be allowed.

The CEERT Parties and the CalWEA Parties each propose approaches to simultaneously allow for negotiation but to control the negotiation process. We do not adopt such an approach here, but we believe that the general concept has merit, and we may consider it further in the future.

A number of parties proposed specific language for certain terms and conditions. Even though this was not required by the ALJ Ruling that established the process for this phase, we hope that these examples of possible language prove to be useful to the parties. We continue to encourage the parties to negotiate, and hope that some of the remaining disagreements can be resolved. In the meantime, however, consistent with the ALJ Ruling, we do not adopt specific language here, but only identify those terms and conditions that will be considered "standard," and whether those standard terms and conditions can be modified.

Terms and Conditions to be Standardized

The following list of terms and conditions was used as a template in the ALJ Ruling, based on discussions at workshops:

1. CPUC approval

   This will be standardized, and may not be modified by the parties. This is an area where the CPUC cannot and does not delegate its authority to the parties.

2. Definition and ownership of RECs

   This will be standardized, and may not be modified by the parties. There is a need for true standardization here, as the Commission must ensure that the utilities are purchasing the attributes needed to satisfy compliance with the law. Parties may propose standardized language that is conceptual or flexible enough to meet new or unforeseen situations.

3. SEP awards, contingencies

   This will be standardized, and may not be modified by the parties.

4. Confidentiality

   This will be standardized, consistent with the most recent Commission decisions. Parties may only modify this to allow for additional disclosure.

5. Contract term

   This will be standardized, and may not be modified by the parties. As described above, however, the standard term may contain blanks that the parties fill in as needed, such as "This contract has a term of _____ years."[4]

6. Eligibility

   This will be standardized, and may not be modified by the parties.[5]

7. Performance standards/requirements

   Standardization of this is statutorily required. This will be standardized, but may be modified by the parties. We will consider imposing limits on negotiability.

8. Product definitions

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[4] Parties should note the discussion of this issue in D.03-06-071 at p. 57.

[5] Parties should note that the CEC will address this issue in its guidebooks.

This will be standardized, but may be modified by the parties. We will consider imposing limits on negotiability.

9. Non-performance or termination penalties and default provisions

   This will be standardized, but may be modified by the parties. We will consider imposing limits on negotiability.

10. Milestones

    This will not be standardized, but is left to negotiation by the parties.

11. Pricing structures, restrictions

    This will not be standardized, but is left to negotiation by the parties.

12. Credit terms

    This will be standardized, but may be modified by the parties.

13. Power delivery

    This will not be standardized, but is left to negotiation by the parties.

14. Delivery point

    This will not be standardized, but is left to negotiation by the parties.

15. Contract modifications

    This will be standardized, and can only be modified to the extent it addresses terms and conditions that the parties are allowed to modify or negotiate. Parties may not modify mandatory terms and conditions.

16. Assignment

    This will be standardized, but may be modified by the parties.

17. Applicable law

    This will be standardized, and may not be modified by the parties. California law is applicable.

18. Dispute resolution

This will not be standardized, but is left to negotiation by the parties.

19. Representations and warranties

    This will not be standardized, but is left to negotiation by the parties.

20. Indemnity

    This will not be standardized, but is left to negotiation by the parties.

21. Force majeure

    This will not be standardized, but is left to negotiation by the parties.

22. Scheduling coordination

    This will not be standardized, but is left to negotiation by the parties.

23. Imbalance issues

    This will not be standardized, but is left to negotiation by the parties.

24. Prevailing wage, minority and low-income issues

    This will not be standardized, but is left to negotiation by the parties.

25. Project modifications

    This will not be standardized, but is left to negotiation by the parties. We will consider imposing limits on negotiability.

26. Flow down of provisions

    This will not be standardized, but is left to negotiation by the parties.

All terms and conditions must be consistent with the law and all applicable Commission decisions. Given the early stage of development of the RPS program, these categorizations should be considered preliminary, and subject to

change as the parties and the Commission gain more experience with the program.

We are encouraged by the number of parties that are working in relatively broad coalitions, and we hope that the guidance provided by this ruling will enable the parties to reach further consensus. Ideally, as discussed in D.03-06-071, the parties will be able to settle on the actual language to be standardized.

Given the parties' familiarity with this issue, more workshops do not appear to be necessary. Parties may meet on their own if they so desire. Accordingly, the next steps will be briefing, followed by a settlement conference before the assigned ALJ. Opening briefs are due March 23, 2004, and reply briefs are due April 1, 2004. All briefs that propose specific language must set forth the proposed language for each term and condition using the sequence and numbers used above. A settlement conference is set for April 8, 2004.

IT IS RULED that:

1. The contract terms and conditions that are to be standardized, pursuant to Pub. Util. Code § 399.14(a)(2)(D), are described above.

2. The adoption of specific language for each standard term and condition will be done via Commission decision.

3. Opening briefs are due March 23, 2004, and reply briefs are due April 1, 2004. All briefs that propose specific language must set forth the proposed language for each term and condition using the sequence and numbers used above. A settlement conference is set for April 8, 2004.

Dated March 8, 2004, at San Francisco, California.

/s/ MICHAEL R. PEEVEY	/s/ PETER V. ALLEN
Michael R. Peevey	Peter V. Allen

Assigned Commissioner Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Joint Ruling of Assigned Commissioner and Administrative Law Judge Regarding Procedure for Adoption of Standard Contract Terms and Conditions on all parties of record in this proceeding or their attorneys of record.

Dated March 8, 2004, at San Francisco, California.

/s/ KE HUANG
Ke Huang

N O T I C E

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